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Strengthening of flag State implementation

Submitted by the Secretariat of the International Maritime Organization (IMO)

1. In paragraph 28 of its resolution 58/240, the General Assembly invited the International Maritime Organization (IMO) and other relevant competent international organizations to study, examine and clarify the role of the "genuine link" in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. A similar invitation is contained in paragraph 22 of Assembly resolution 58/14 on sustainable fisheries, including the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments.

2. At its ninety-second session, which is to be held from 21 to 25 June 2004, the Council of IMO will consider the invitation contained in both resolutions and decide as appropriate.

3. The following paragraphs contained a summary of the main features of the mandate and work of IMO regarding the strengthening of flag State jurisdiction. This document should be read together with the report of the Inter-Agency Consultative Group on Flag State Implementation, which met in Paris on 7 May 2003 (see: http://www.un.org/Depts/los/general_assembly/documents/flagstateimpl.pdf).

Background on the mandate of the International Maritime Organization

4. Since 1959, IMO, the sole specialized agency of the United Nations exclusively devoted to maritime affairs, has developed comprehensive multilateral treaties imposing, primarily upon the flag State, a wide range of technical measures designed to improve the safety of shipping and prevent marine pollution from ships. Parenthetically, measures of port State control are also regulated in IMO treaties

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aimed at preventing and correcting deficiencies in the exercise of flag State jurisdiction.

5. The most important IMO treaties are implemented worldwide by States representing together between 95 and 99 per cent of the gross tonnage of the world's merchant fleet.

6. Since 1973, the Secretariat of IMO (at that time the Intergovernmental Maritime Consultative Organization (IMCO)) actively contributed to the work of the Third United Nations Conference on the Law of the Sea in order to ensure that the development of IMO instruments conformed to the basic principles guiding the development of the 1982 United Nations Convention on the Law of the Sea. Although IMO is explicitly mentioned in only one of the articles of the Convention (article 2 of annex VIII), several provisions in the Convention refer to the "competent international organization" for the adoption of international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from vessels and from dumping at sea.

Strengthening of flag State jurisdiction: the question of genuine link

7. Bearing this background in mind, IMO's mandate should be related to the concept of the "genuine link" requirement regulated by the Convention on the Law of the Sea in article 91(1) in an operative way, to be established in strict connection with the subject matters regulated by article 94(1) of the Convention as internationally binding conditions for the effective exercise of flag State jurisdiction.

8. The exercise of flag State jurisdiction on technical matters related to safety of navigation and prevention of marine pollution is exclusively within the mandate of IMO. Since the inception of its activities, the organization has continuously reaffirmed its mandate in this regard through the development of treaties and initiatives that have resulted in the strengthening of flag State implementation, up to the point that almost all technical rules and regulations applicable on board ships engaged in commercial navigation worldwide are binding and self-executing through provisions contained in IMO treaties and codes.

9. IMO's mandate in the field of flag State jurisdiction is complemented by the work of other international organizations on subject matters that, while not regulated by IMO, clearly involve the exercise of flag State jurisdiction in furtherance of the paramount objectives to be achieved through the operation of both articles 91(1) and 94 of the Convention on the Law of the Sea. In this regard, particular mention should be made of article 94(1) with reference to the need to exercise flag State jurisdiction and control in connection with social matters that are clearly within the purview of the International Labour Organization (ILO). The existence of the genuine link requirement in connection with the exercise of flag State jurisdiction also involves the Food and Agriculture Organization of the United Nations (FAO) in connection with the catching operations of fishing vessels.

10. Therefore, a comprehensive assessment of the implementation of the aforementioned articles of the Convention on the Law of the Sea can only be undertaken in cooperation with other interested agencies.

11. Article 91(1) of the Convention on the Law of the Sea acknowledges the right of every State to "fix the conditions for the grant of nationality and for the right to fly its flag". It is in this regard that the application of technical rules and regulations to implement safety and anti-pollution measures have, in the case of IMO, been strictly dissociated from the concept of ownership, which the Convention clearly seems to acknowledge as a subject matter of domestic law beyond its purview.

12. It follows that safety and anti-pollution rules and regulations do not depend for their proper implementation on the concept of ownership. On the contrary, the main requirement for this proper implementation is the existence of a maritime administration able to effectively supervise compliance with IMO rules, regulations and standards. In this regard, the need for expertise and resources to establish effective maritime administrations should be seen as a consequence of IMO's work. Thanks to the wide adherence to IMO treaties, commercial shipping is a highly regulated industry, and one which is required, under international maritime law developed under the aegis of IMO, to comply with strict safety and anti-pollution measures.

13. The treaty law obligations imposed upon 95 to 99 per cent of the world's merchant fleet to comply with the ever-increasing demands for safer and more secure ships and cleaner oceans contained in IMO treaties has led to a situation where all States, irrespective of the features of their ships' registries, must ensure that ships flying their flag apply IMO rules, regulations and standards as a sine qua non prerequisite to trade. Statistics show that cases of non-compliance are not related to the ship register features but to the effectiveness of the supervisory role (or lack thereof) exerted by the maritime administrations concerned.

14. IMO submits that, within the present framework established by the Convention on the Law of the Sea and the mandate of the organizations invited to participate in the study of means to strengthen flag State implementation, two main factors must be borne in mind, namely:

(a) The elaboration of new international rules cannot be conceived as a means of counteracting the lack of proper implementation of existing ones. States and international organizations should primarily focus on the strengthening of existing implementation mechanisms, as IMO is doing at present, having placed particular emphasis on the development and subsequent implementation of a Member State audit scheme, which is intended to comprehensively assess the degree of conformance by a State to its obligations under the applicable IMO treaties;

(b) Questions relating to ownership of vessels should be considered as subject matters of an economic corporate nature that clearly fall beyond the purview of the law of the sea and the mandate of the international organizations as defined in the Convention on the Law of the Sea; in the view of IMO, what is important for the purposes of establishing a "genuine link" is to identify who assumes the responsibility for the operation and control of the vessel.